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No. 80-2100

IN THE

Supreme Court of the United States

October Term, 1980

QUENTIN ROGERS, et al.,
Appellants,

—*versus*—

HERMAN LODGE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF APPELLEES HERMAN LODGE, et al.

ARTHUR KINOY
Counsel of Record for Amicus

FRANK E. DEALE
ROBERT BOEHM
c/o Center for Constitutional Rights
853 Broadway, 14th Floor
New York, New York 10003
(212) 674-3303

Attorneys for Amicus

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Pursuant to Supreme Court Rule 36.3, the Center for Constitutional Rights (CCR) respectfully moves for leave to file the attached Brief *Amicus Curiae* in support of Appellee Herman Lodge et. el., in the above captioned case.* CCR is a non-profit legal and educational corporation dedicated to advancing and protecting the rights and privileges guaranteed by the United States Constitution. CCR has litigated numerous cases involving the voting rights of minorities and believes that affirmance of the decision of the Fifth Circuit in the case at bar is necessary to assure effective participation in the political pro-

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* As the attached letters indicate, Appellants have refused to provide their consent, thereby making this motion necessary. See, Appendix at 1a.

cess by minorities who have historically been victims of racial discrimination.

In the attached brief, *Amicus* has argued in concise manner that the criteria outlined in *Zimmer* v. *McKeithen* 485 F.2d 1297 (5th Cir. 1973) aff'd sub nom., *East Carroll Parish School Board* v. *Marshall* 424 U.S. 636 (1976), is sufficient to establish an inference of purposeful discrimination in the retention of the Burke County at-large voting system, and that the *Zimmer* factors are consistent with proof of discriminatory purpose as elucidated in this Court's previous cases. *Amicus* has had the oportunity to read the *Brief of Appellees* and believes that an issue which troubled the plurality in *Bolden*, the link between "evidence of discrimination", and "evidence of the constitutional invalidity of the electoral system" 446 U.S. at 74, deserves more elaborate treatment than Appellees were able to provide because of their need to outline the wealth of factual data presented in the case. *Amicus* has argued that in the circumstances present today in Burke County, there is a direct line from the willful failure of elected white officials to represent Blacks, to the maintenance of the electoral system that enables continued discrimination. Once this connection is recognized, the need for retaining the essence of the *Zimmer* test becomes apparent.

For the foregoing reasons, *Amicus* prays that this motion for leave to file its brief be granted.

Respectfully submitted,

ARTHUR KINOY
Counsel of Record for Amicus

FRANK E. DEALE
ROBERT BOEHM

Center for Constitutional Rights
853 Broadway, 14th Floor
New York, New York 10003
(212) 674-3303

Interest of *Amicus Curiae*

The Center for Constitutional Rights is a non-profit, legal and educational corporation dedicated to advancing and protecting the rights and privileges guaranteed by the United States Constitution. CCR belives that affirmance of the decision of the Fifth Circuit in the case at bar is necessary to assure participation in the political process by minorities who have historically been victims of racial discrimination. The case is particularly important to CCR because this Court's decision may determine the extent to which minority voting rights continue to be protected by provisions of the United States Constitution. Current indications that the Voting Rights Act may soon be changed persuade CCR that renewed attention must be focused upon voting guarantees that are constitutionally based and not subject to continuously shifting political currents.

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BRIEF *AMICUS CURIAE* OF THE CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF HERMAN LODGE, *et al.*

Introduction and Summary of Argument

For almost twenty years since the landmark decision in *Baker* v. *Carr*, 369 U.S. 186 (1962), this Court has, in a series of cases, recognized that impairment of the right to vote, through debasement or dilution, could violate the Fourteenth Amendment rights of distinct groups of citizens. *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Burns* v. *Richardson*, 384 U.S. 73 (1966); *Fortson* v. *Dorsey*, 379 U.S. 433 (1965); *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971). In *White* v. *Regester*, 412 U.S. 755 (1973) this Court for the first time upheld a claim of unconstitutional vote dilution brought by a

group of minority citizens. There, citing language from *Whitcomb* v. *Chavis*, this Court held that:

> The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice. *White* v. *Regester*, 412 U.S. at 766.

In the same year the Fifth Circuit, closely following this Court's reasoning in *White* and *Whitcomb*, set out a nonexhaustive list of the kind of findings that would underpin a successful claim of unconstitutional vote dilution. *Zimmer* v. *McKeithen*, 485 F.2d 1297 (1973), *aff'd sub nom., East Caroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976). In *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980) a plurality of this Court held that only a purposeful dilution would offend the Fourteenth Amendment and stated that *Zimmer* was "decided upon the misunderstanding that it is not necessary to show a discriminatory purpose in order to prove a violation of the equal protection clause . . ." 446 U.S. at 71.

Left open by the *Bolden* plurality opinion, however, was the degree to which the *Zimmer* factors, derived from *White* v. *Regester*, might sufficiently underpin an inference of discriminatory purpose in a challenge to the *maintenance* (as opposed to the enactment) of an electoral system that dilutes minority votes. In this brief, *Amicus* will argue that in the absence of "smoking gun" evidence of purpose, the *Zimmer* factors, standing alone, are sufficient to underpin an inference of discriminatory purpose in a challenge to the maintenance of an at-large electoral scheme that effectively dilutes the voting power of minority groups. The factors outlined in the *Zimmer* case are consistent with proof of discriminatory purpose as

elucidated in *Washington* v. *Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights* v. *Metropolitan Development Corp.*, 429 U.S. 252 (1977); *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977) and *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256 (1979), as well as with *Whitcomb* and *White*. The *Zimmer* factors also provide the most cogent, administrable standard of proof to address these issues. A finding of unconstitutional vote dilution based on inference of purpose from the *Zimmer* factors will represent a single, administrable intervention by the federal judiciary to secure constitutionally mandated minority access to the political process. Once this political access is secured, minorities can then utilize the political process to insure the viability of other constitutional protections.

ARGUMENT

I. The Fifth Circuit Correctly Read *Bolden* As Holding That The Zimmer Criteria Is Still Sufficient To Establish An Inference Of Purposeful Discrimination In The Retention Of The Burke County At-Large Voting System.

The various opinions of this Court in the *Bolden* case, and in some of the cases which preceded *Bolden*, indicate that for some time this Court has been grappling with the question of what constitutes sufficient proof to sustain an equal protection * challenge to an at-large electoral

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* Whether such a challenge relies on the Fourteenth or Fifteenth Amendment is irrelevant under this Court's interpretation of those amendments. The Court of Appeals did not distinguish the two constitutional grounds in its holding. See also, *Bolden*, 446 U.S. at 94-103 (White, J. dissenting). Appellants' have presented to the Court the question of whether the Fifteenth Amendment reaches vote dilution at all. Jurisdictional Statement

[Footnote continued on following page]

scheme which dilutes the votes of minority groups. Part A of the plurality opinion can be fairly read to establish that proof of discriminatory purpose is necessary to make out a vote dilution claim. However, the Court nonetheless recognized that disproportionate impact and discriminatory effect properly inform the inquiry into discriminatory purpose. 446 U.S. at 73. While Part B of the plurality opinion is primarily concerned with the drawbacks of a holding that would in essence protect a minority against electoral defeat, the plurality also distinguishes a holding of that character from a case where minorities were in fact denied equal access to the electoral process. 446 U.S.

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at iii., Brief for Appellants at ii. Given this Court's application of the Equal Protection Clause to vote dilution, it would seem unnecessary for this Court to reach the issue of the scope of the Fifteenth Amendment. *Amicus* wishes to note, however, that appellants suggested limitation of the Amendment is entirely unfounded. Appellants refer to the issue only in passing, Brief for Appellants at 27, relying on dicta offered without discussion or authority by a panel of the Fifth Circuit. *McMillan* v. *Escambia County*, 638 F.2d 1239, 1243 n. 9 (5th Cir. 1981).

Appellants would perpetuate the misunderstanding of the *Escambia* panel that the issue was left undecided in *Bolden*. In *Bolden*, itself a vote dilution case, four Justices found that the system challenged violated the Fifteenth Amendment. Opinions of Justices Blackmun, White, Marshall and Brennan. A fifth Justice, Justice Stevens, explicitly stated his belief that the Amendment reaches vote dilution. 446 U.S. at 84 and n. 3. Moreover, Justice Stewart's apparent intimation that the Fifteenth Amendment permits vote dilution came only as an oblique reference in the context of his discussion of the Fifteenth Amendment intent requirement. None of the cases cited in that section of the plurality's opinion lend any support to their restrictive reading of the Amendment. Appellants' reading of the Fifteenth Amendment would reduce the words of the Fifteenth Amendment to "language illusory in symbol and hollow in substance." *Id.* at 129 (Marshall, J. dissenting). Those like appellants who would deny an effective voice to minorities could then simply resort to indirect means with the confidence that the Fifteenth Amendment would provide no obstacle to their discrmination. See, generally, Derfner, *Racial Discrimination and the Right to Vote*, 26 Vand. L. Rev. 523 (1973).

at 77. The issue in *Bolden*, as in school desegregation cases such as *Columbus Board of Education* v. *Penick*, 443 U.S. 449 (1979), and *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526 (1977), is what would be a manageable standard to assess the constitutionality of such electoral systems given the occasional blurring of the purpose-effect distinction. The Fifth Circuit read the *Bolden* opinion in the context of the full range of previous decisions of this Court that served as guideposts for assessing proof in this area, and reached the conclusion that the *Bolden* decision did not extinguish the *Zimmer* analysis. *Amicus* is convinced that the Fifth Circuit decision was correct.

A close reading of the plurality *opinion* in *Bolden* suggests that the plurality did not reject the *Zimmer* factors. Rather, the factual circumstances of *Bolden* were not sufficient to meet the *Zimmer* criteria for ascertaining discriminatory purpose. The plurality found that any inference of discriminatory purpose deriving from the fact that no Black citizen had been elected to the Mobile City Commission was contradicted by the finding that Blacks were able to participate in the electoral process without hindrance. 446 U.S. at 73. The inference of discriminatory purpose deriving from the history of past discrimination suffered by Blacks was negated because, apparently, that discrimination was "distant" and did not have present effects touching the ability of Blacks to participate in the voting process. 446 U.S. at 74. Similarly, the plurality found that any inference of discriminatory purpose arising from discrimination in the dispensing of public services was only tenuous evidence as to the purpose behind the existence (as opposed to the maintenance) of the at-large electoral scheme under challenge. 446 U.S. at 74. Finally, in those circumstances, there was little inference of purpose that could be enhanced by application of the *Zimmer* enhancing factors. 446 U.S. at 74. The facts of *this* case as found

by the trial court, the Court of Appeals, and as presented in the Brief of Appellees, mandate that this Court affirm the decision of the Fifth Circuit and hold that the Burke County at-large electoral system violates the Fourteenth and Fifteenth Amendments.*

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* Although not addressed by the trial court, appellee Lodge added in his Amended Complaint a claim that the at-large electoral system in Burke County was in violation of the Thirteenth Amendment. Amended Complaint No. 2, ¶ 21, in the Joint Appendix of the parties at p. 13. The Court of Appeals also did not address the claim, although it concluded that the severe oppression of Blacks in Burke County "is directly traceable to their historical position as slaves." 639 F.2d 1358, 1381, n. 46.

One aspect of this case which has full agreement of all the parties is that the at-large system presently under challenge was instituted in 1911, a time when Blacks were still not allowed to vote in Burke County notwithstanding the passage 40 years previously of the Thirteenth, Fourteenth and Fifteenth Amendments. Those Amendments, especially the Thirteenth, were specifically designed to accomplish "the political and social elevation of Negroes to all the rights of white men." Congressional Globe, 38th Congress, 1st Session at 2987 (1864), and were in full effect when the statute authorizing at-large elections in Burke County was passed. *Amicus* deems it highly likely that were Burke County Blacks fully enfranchised in 1911, as the framers of the Reconstruction Amendments intended, the at-large election authorizing statute would never have been passed. Implementation of the at-large voting scheme was therefore necessarily based on the fact that the voting population was composed entirely of a homogeneous group of white males, and that, consequently, there were no minority votes to be diluted. The statute thus stands as a relic of the institution of slavery in that during slavery the vote was limited to a tiny privileged portion of the population.

This Court has held that the Thirteenth Amendment prohibits the institution of slavery and all the badges and incidents thereof. Civil Rights Cases, 109 U.S. 3, 20 (1883); *Jones* v. *Alfred H. Mayer*, 392 U.S. 409 (1968). An at-large electoral scheme which, upon enactment, was premised upon, and implemented despite the fact that a large section of the population was unlawfully disenfranchised should not be allowed to pass constitutional muster today, especially when it continues to have a discriminatory effect upon those same groups that were unlawfully excluded from participation when the at-large system was instituted. The at-large system of Burke County thus violates the Thirteenth, as well as the Fourteenth and Fifteenth Amendments.

Washington v. *Davis*, 426 U.S. 229 (1979) made clear that the invidious quality of a law or action claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. At 241. A discriminatory purpose need not be expressed on the face of a challenged statute or decision, *Id.* at 241. Indeed, disproportionate impact, *i.e.*, the fact that a law or action bears more heavily on one group than another, is relevant to the inquiry into purpose, especially as a starting point. *Id.* at 242, *Arlington Heights*, 429 U.S. at 266; *Feeney*, 442 U.S. at 274. In some cases an action is unexplainable on grounds other than discrimination. In most cases, however, discriminatory purpose must be inferred from the totality of relevant facts, including the fact of disproportionate impact, *Washington* v. *Davis*, 426 U.S. at 242. Inferring such purpose demands a sensitive inquiry into whatever circumstantial and direct evidence is available, *Arlington Heights*, 429 U.S. at 266. *Arlington Heights* provides a suggestive, but not exhaustive, list of types of circumstantial and direct evidence that might underpin an inference of discriminatory purpose. Such evidence includes:

> [1] the historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes . . .
>
> [2] the specific sequence of events leading up to the challenged decision . . .
>
> [3] departures from the normal procedural sequence . . .
>
> [4] substantive departures . . . particularly if the factors usually considered important by the decision-maker strongly favor a decision contrary to the one reached.
>
> [5] The legislative or administrative history . . .

429 U.S. at 267-268.

Given a sensitive inquiry focusing on such circumstantial and direct evidence, there is no need to prove, nor in most cases would it be feasible to prove, that the challenged decision was motivated *solely* by discriminatory purpose, 429 U.S. at 265. Rather, the dispositive question is whether the plaintiff can show only that the challenged action rested "in part", *Id.* at 270 n.21, or "in some measure", *Feeney*, 442 at 276, on a discriminatory purpose, or that the discriminatory purpose was a "motivating" factor in the challenged action, *Mt. Healthy* at 287. Once a *prima facie* case is made, the burden shifts to the defendant, *Washington* v. *Davis* at 241, to establish "by a preponderance of the evidence," *Mt. Healthy*, 429 U.S. at 287, "that the same decision would have resulted even had the impermissable purpose not been considered," *Arlington Heights* at 429 U.S. 270 n.21. If the defendant fails to sustain this burden, the inference of discriminatory purpose "ripen[s] into proof," *Feeney*, 442 U.S. at 279 n.25, and the challenged action, decision or statute must be struck down.

The five types of circumstantial and direct evidence described above and by the court in *Arlington Heights*, 429 U.S. at 267-268, are particularly appropriate for inferring discriminatory purpose in the enactment of a law or in the making of a decision. It is, of course, in enactment or explicit decision-making that legislative or administrative history and departures from sequence, procedure or substance can most clearly underpin an inference of illegitimate purpose. The five types of evidence implicitly apply a common sense logic to ferret out purpose in enactment or decision-making. Departures from settled expectation (of sequence, procedure and substance), especially when combined with invidious historical biases (found in the historical background and legislative or administrative history) normally trigger a suspicion of improper motive. At that point, as this Court acknowledged in *Arlington Heights*, *Mt. Healthy*, and *Feeney*, the

burden should shift to the enacters or decision-makers to allow them to explain away the departures and biases, if they can.

The five types of evidence are, however, less helpful where the task is to infer purpose in the *maintenance* of a system which has a disproportionate impact on minorities, like at-large dilution of minority voting. Since, absent challenge, an electoral system will continue as is indefinitely, those in charge of the system normally need to take no action to maintain it. Maintenance occurs without the enactment or decision necessary to focus the inquiry into evidence of purpose mandated by *Arlington Heights*. In this context especially, "It is unrealistic . . . to require the victims of alleged discrimination to uncover the actual subjectve intent of the decision-maker . . ." *Washington* v. *Davis*, 446 U.S. at 253 (Stevens, J., concurring). Nevertheless, we can discover analogies to the types of evidence described in *Arlington Heights* that can focus the inquiry into evidence of purpose in the case of maintenance of a system which has a disproportionate impact on minorities. As in *Arlington Heights*, we should be guided by departures from settled expectation and by invidious historical biases.

It is, of course, precisely these types of evidentiary factors that this Court focused upon in *White* and *Whitcomb*, for the roughly analogous situation of purposeful dilution of minority voting through maintenance of an at-large voting system. In those cases, the Court directed its attention particularly to minority participation in and access to the political processes, and on election and nomination of representatives, *White* v. *Regester*, 412 U.S. at 766. Our normal expectation is that such participation and access will be open to all citizens and that "even improvident decisions will eventually be recitified by the democratic process." *Feeney*, 442 U.S. at 272.

Where evidence is offered that indicates a drastic departure from this expectation, especially when combined with a history of discrimination which has produced lingering effects which cut against this expectation, an inference of purposeful discriminatory maintenance may properly be made. Indeed, the Court has sanctioned such inferences in the Northern school desegregation context. See, *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526 (1979), and *Columbus Board of Education* v. *Penick*, 443 U.S. 449 (1979).

The types of factors distilled from *White* and *Whitcomb* by the Fifth Circuit in *Zimmer* are perhaps the only kind of evidence (absent a "smoking gun") that properly permit an inference of purposefully discriminatory maintenance in line with this Court's past elucidation of proof of discriminatory purpose. *Zimmer* set out four primary factors and a number of enhancing factors. The "primary" factors include: the group's accessibility to political processes (such as the slating of candidates), the responsiveness of representatives to the "particularized interests" of the group, the weight of the state policy behind at-large districting, and the effect of past discrimination upon the group's participation in the election system. 485 F.2d at 1305. The "enhancing" factors include: the size of the district; the portion of the vote necessary for election (majority or plurality); where the positions are not contested for individually, the number of candidates for which an elector must vote; and whether candidates must reside in subdistricts.*

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* The inference of discriminatory purpose from the totality of circumstances could, in some cases, be strengthened by evidence of *disproportionately* depressed socio-economic conditions of the minority in question. For instance, the Fifth Circuit held that extensive past discrimination by Burke County officials inhibited the ability of Blacks to participate in the Burke County electoral process. 639 F.2d at 1378, 1379. Such a finding was, of course, an important part of the analysis advanced by this Court in *White* v. *Regester*, 412 U.S. at 766-770.

First, consider proof of a history of official racial discrimination directly touching the ability of minorities to register and vote and to participate in the democratic process. *Zimmer*, 485 F.2d at 1305; *White* v. *Regester*, 412 U.S. at 766. Past discrimination with present effects going to the heart of a group's ability to participate in the processes of democracy is a key factor in the ascertaining of discriminatory purpose. While it is true that "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful," 446 U.S. at 74, suspicion should be aroused and may properly lead to an inference of discriminatory purpose where there has been no effort by those in power to remedy the present effects of past discrimination. In those circumstances, our expectation that the democratic process will rectify improvident past decisions is clearly violated. Similarly, direct evidence of the exclusion of minorities from participation in the white-controlled electoral processes, *Zimmer*, 485 F.2d at 1305; *White*, 412 U.S. at 766-767, supports an inference of discriminatory purpose because we would expect minority participation, absent a wilful effort to exclude, or absent evidence showing that minorities were simply not interested in participating. In like manner, evidence of purposeful discrimination in the provision of public services from education to road paving, which are additional important components, of the measure of *responsiveness* to minority needs, *Zimmer*, 485 F.2d at 1305; *White*, 412 U.S. at 767, supports an inference of discriminatory purpose in maintaining the system by which discriminating representatives are elected. This is because discrimination in the provision of such services is an extraordinarily effective means of hindering minority participation in local political processes. Absent contrary evidence of purpose, proof of such discrimination that goes so directly to the ability of minorities to participate violates our expectation that the electoral processes as constituted are being maintained for proper purposes. In turn, evidence that the state

policy behind the electoral system is not, even if neutral in origin, divorced from the maintenance of racial discrimination, *Zimmer*, 485 F.2d at 1305, permits an inference that maintenance is for discriminatory purposes. This is especially proper in the case at bar, where maintenance is a function of local desire to minimize minority participation. Here, the failure to act to change an electoral system not rooted in a strong non-discriminatory state policy permits an inference of purposeful maintenance since control of the electoral system is the means of minimizing minority participation. Finally, of course, the enhancing factors may buttress the primary evidence of purpose, *Zimmer*, 485 F.2d at 1305; *White*, 412 U.S. at 766-767.

In sum, the *Zimmer* test requires the same analysis for a case challenging the *maintenance* of a discriminatory electoral system as the *Arlington Heights* criteria require for a case challenging a discriminatory enactment. Proof of the *Zimmer* factors, after a sensitive inquiry into such direct and circumstantial evidence of intent as exists, permits the trial court to perform its traditional function and properly to infer purpose based on the evidence before it. Proof of the *Zimmer* factors does not *require* a finding of discriminatory purpose; but their proof after an "intensely local appraisal", *White*, 412 U.S. at 769-770, of the evidence does permit an inference of purpose to be drawn and thereby, the *prima facie* case to be proved. Where the defendants have failed to produce substantial contrary evidence of purpose, the inference would ripen into proof.

Allowing a permissible inference of purpose from proof of the *Zimmer* factors—in itself an extremely difficult burden for a plaintiff—will assist the trial court to reach the correct result because the inference shifts the burden to defendants. As in other contexts, defendants in maintenance-voting dilution cases are obviously

the best source of proof of purpose, for they know their own motivations and have easiest access to information concerning maintenance of the system by which they were elected. See, generally, *Keyes* v. *School District No. 1*, 413 U.S. 205, 209 (1973); J. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials of Common Law*, §§ 2486-91 (3d ed. 1940); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1207, 1255 (1970).

In essence, inference from proof of *Zimmer*-like criteria is consistent with past decisions of this court elucidating the inquiry into discriminatory purpose. Moreover, proof of such criteria is the only reasonable burden that can be placed on plaintiffs without forcing them to undertake the type of extreme motivational inquiry this court has labeled wholly improper in other settings. *See, Palmer* v. *Thompson*, 403 U.S. 217 (1971); *United States* v. *O'Brien*, 391 U.S. 367 (1968).

II. Purposeful, Systematic Exclusion Of Minority Citizens From Participation In The Process Of Local Governance Requires A Remedial Invalidation Of The Unconstitutional Electoral System Which Sustains The Ability To Exclude.

As this Court recognized in *Bolden*, *White* and *Whitcomb*, the crucial component in maintaining a discriminatory at-large electoral system is local white control over minority electoral access and opportunity to participate, with a purpose to keep minority citizens from ever being able effectively to articulate a demand for change of the electoral system. The *Zimmer* factors are a direct measure of the degree of purposeful, systematic exclusion of minority citizens from participation in the processes of democratic governance. If there is a purpose to exclude Black citizens from participation and thereby maintain

white supremacy in power, the simple means are implementation and maintenance of an electoral system that delivers the power to exclude Black citizens from the system.

One inescapable conclusion from the record of the case at bar is that Black citizens of Burke County have been intentionally submerged within an electoral system whose representatives purposefully fail—indeed refuse—to represent them. Appellants have managed to achieve an end virtually identical to that achieved by the "uncouth" line-drawing described in *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), through wilful acts only slightly more subtle than in *Gomillion*. Black citizen voice in the political process has been effectively stilled and is as effectively ignored as if it were zoned out of Burke County.

From the vantage-point of submergence in an electoral system whose representatives purposefully fail to represent, a challenge to the electoral system is especially appropriate. Where the evidence in a given case makes out such submergence, as it apparently did not in the plurality's opinion in *Bolden*, there is a direct line from the wilful failure to represent, to maintenance of the electoral system that enables continued discrimination.*

Short of separately litigated challenges to each instance of purposeful discrimination that cumulatively makes out minority submergence and wilful failure to represent, a challenge to the electoral system is perhaps the only plausible way of enabling their reemergence into

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* Such submergence establishes the link between "evidence of discrimination," and "evidence of the constitutional invalidity of the electoral system" which concerned the plurality in *Bolden*, 446 U.S. at 74.

the mainstream processes of governance.* Separately litigated challenges, over education, housing, municipal jobs, disbursement of public services and benefits, brought on behalf of the same minority plaintiff class would present a remedial administrative nightmare for the federal court in question and would be an impossible burden for the plaintiffs to bear. It may well be true that once each separate purposeful barrier to the ability of Blacks in Burke County to participate is removed their participation would finally occur. However, it is equally true that once the purposeful means of perpetuating those separate barriers, i.e., the vote diluting electoral system, is changed to permit access, then the elected officials of Burke County can begin to move to dismantle the barriers and the effects of past discrimination. Judicial invalidation of the unconstitutional electoral system limits the federal judicial involvement to a single, remedial, administrable, intervention to secure constitutionally mandated access. It is far preferable to involving the judiciary in the day-to-day decision-making of local government. While this Court's decision to sustain the lower verdict in the case at bar would not immediately reverse

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* It is in this context that the issue of responsiveness to minority needs and concerns should be understood. If by proof of unresponsiveness the Circuit Court below meant to get at the qualitative issue of minority submergence, then such proof is a proper element of plaintiffs' *prima facie* case. If instead, the Court below meant to suggest a quantitative evaluation, e.g., counting up the number of unresponsive governing actions in each area of minority need, then proof of such unresponsiveness should not be given controlling significance. If such a quantititive evaluation were controlling, then local officials who were purposefully maintaining an at-large electoral system in order to dilute minority votes could defeat the constitutional challenge simply by satisfying some minimal number of essential minority needs. In any case, the lower court conclusion of unconstitutional voting dilution is not changed even if proof of unresponsiveness is not given controlling significance. It is therefore difficult to see why appellants raise this issue before the Court.

the effects of unconstitutional vote dilution in Burke County, it would properly enable the gradual process of regaining Black citizen voice in Burke County's political process.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

ARTHUR KINOY
Counsel of Record for Amicus

FRANK E. DEALE
ROBERT BOEHM
c/o Center for Constitutional Rights
853 Broadway, 14th Floor
New York, New York 10003
(212) 674-3303

Attorneys for Amicus *

* Counsel for *Amicus* wish to express their appreciation to Michael Borrus and Steve Levitas, third year students at Harvard Law School, and Jane Ransom, legal worker at the Center for Constitutional Rights. Without their dedicated assistance, this brief could not have been written.

APPENDIX

Letterhead of

HEARD, LEVERETT & ADAMS, P.C.

December 11, 1981

Please reply: Elberton

Mr. Frank E. Deale, Staff Attorney
Center for Constitutional Rights
853 Broadway
14th Floor
New York, N.Y. 10003

Re: *Rogers* v. *Lodge, No. 80-2100*

Dear Mr. Deale:

I have conferred with my clients and we have concluded that we will not grant permission for the filing of amicus briefs in this case.

Your truly,

/s/ E. FREEMAN LEVERETT

.....

E. FREEMAN LEVERETT

EFL:er

cc: Mr. John R. Myer

Letterhead of

MESSERMAN & MESSERMAN CO., L.P.A.

December 11, 1981

Mr. Frank Deale
Center for Constitutional Rights
Fourteenth Floor
853 Broadway
New York, New York 10003

Re: *Rogers* v. *Lodge*
U.S. Supreme Court No. 80-2100

Dear Mr. Deale:

This is to confirm my consent to your filing an Amicus Brief in the above case.

Very truly yours,

/s/ DAVID F. WALBERT

.....

DAVID F. WALBERT

DFW:mk